

IN THE COURT OF APPEALS OF MARYLAND

September Term, 2013

No. 087

WATERKEEPER ALLIANCE, INC., *et al.*,

Appellants,

v.

MARYLAND DEPARTMENT OF AGRICULTURE, *et al.*,

Appellees.

On Writ of Certiorari to the Maryland Court of Special Appeals

REPLY BRIEF OF APPELLANTS
WATERKEEPER ALLIANCE, INC., *et al.*

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QUESTIONS PRESENTED

1. Did the Court of Special Appeals err in broadly interpreting an exemption to disclosure under the Maryland Public Information Act, where such exemptions must be construed narrowly and in favor of disclosure?
2. Did the Court of Special Appeals err in holding that Md. Code Ann., Agric. § 8-801.1(b)(2) applies to all types of nutrient management records maintained for any period of time where the plain language expressly applies only to nutrient management plan summaries maintained by the Maryland Department of Agriculture for three years or less?
3. Did the Court of Special Appeals err in deferring to the Maryland Department of Agriculture's interpretation of Agriculture Article § 8-801.1(b)(2), where that expansive interpretation conflicts with the narrowly-tailored exemption to disclosure provided by the plain language of the statute?

INTRODUCTION

This appeal concerns Appellee Maryland Department of Agriculture's ("MDA's") obligation to disclose nutrient management program records under the Maryland Public Information Act ("MPIA"), Md. Code Ann., State Gov't §§ 10-611-630 (West 2013), given the narrow exemption provided by Md. Code Ann., Agric. § 8-801.1(b)(2) (West 2013). This exemption from the MPIA clearly and unambiguously applies only to

identifying information in nutrient management plan (“NMP”) summaries maintained by MDA for three years or less. The Court of Special Appeals erred when it upheld the Circuit Court for Anne Arundel County’s interpretation of Agric. § 8-801.1(b)(2) to include public records beyond NMP summaries maintained for three years or less, such as nutrient management program compliance and enforcement documents, and NMP summaries maintained for more than three years. The lower courts’ expansive interpretation improperly enlarges this narrowly-tailored exemption to the MPIA and contravenes the language and intent of both the MPIA and the Maryland Water Quality Improvement Act of 1998 (“WQIA”), Md. Code Ann., Agric. §§ 8-801-807 (West 2013).

ARGUMENT

I. THE COURT OF SPECIAL APPEALS ERRED BY CONSTRUING A NARROW EXEMPTION TO THE MARYLAND PUBLIC INFORMATION ACT BROADLY

The MPIA creates a presumption of full disclosure, *Kirwan v. The Diamondback*, 352 Md. 74, 80, 721 A.2d 196, 199 (1998), and requires agencies to disclose all public records unless expressly prohibited by law. State Gov’t § 10-612(a), 10-613(a)(1). This Court has therefore established that exemptions to the MPIA must be construed narrowly. *Fioretti v. Md. State Bd. Of Dental Exam’rs*, 351 Md. 66, 77, 716 A.2d 258, 264 (1998). The relevant law creating the exemption whose scope is at issue in this case, Section 8-801.1(b) of the WQIA, provides that:

- (1) A summary of each nutrient management plan shall be filed and updated with the Department [of Agriculture] at a time and in a form that the Department requires by regulation.
- (2) The Department shall maintain a copy of each summary for 3 years in a manner that protects the identity of the individual for whom the nutrient management plan was prepared.

Despite this narrowly tailored language, however, the Court of Special Appeals contravened both the MPLA and the plain language of Agric. § 8-801.1(b)(2) by expanding the exemption to include all documents related to NMPs and NMP summaries, regardless of whether they were submitted pursuant to this recordkeeping provision or created for other purposes, and regardless of how long the records have been in MDA's possession. The vague and unworkable standard established by the Circuit Court and upheld by the Court of Special Appeals, ordering MDA to "protect identifying information that would reveal specific applicant's identity during disclosure of [NMP] documents," *Waterkeeper Alliance, Inc. v. Md. Dep't of Agric.*, 211 Md. App. 417, 454-55, 65 A.3d 708, 730 (2013), requires MDA to make subjective decisions about what information a hypothetical party could use to potentially link an undefined record to any given current NMP summary from which identifying information has been redacted.

To overcome the presumption of disclosure, MDA bears the burden of showing that the limited exemption Agric. § 8-801.1(b)(2) creates for NMP summaries maintained for three years or less applies more broadly than suggested by its plain language. *Fioretti*, 351 Md. at 78, 716 A.2d at 264. MDA and Appellee Maryland Farm Bureau, Inc. ("Farm Bureau") (collectively, "Appellees") attempt to force a broad reading of the exemption, suggesting that in some cases, a record-requestor may be able to connect

NMP-related documents or NMP summaries held for more than three years to current NMP summaries, thereby discovering the identities of plan holders. MDA Br. at 25, Farm Bureau Br. at 9-12. But this type of speculation is simply not enough to overcome the MPIA's presumption of disclosure. While MDA need not make a document-by-document showing that every potential release of un-redacted information will allow a link to a current NMP summary, *see Faulk v. State's Atty. for Harford Cty.*, 299 Md. 493, 474 A.2d 880 (1984), the agency still must demonstrate with some specificity that the disclosures will have the unintended result. *Fioretti*, 351 Md. at 86-87, 716 A.2d at 268-69. MDA has failed to meet that burden.¹

Moreover, MDA has failed to demonstrate that a narrow reading is inconsistent with the legislative intent behind the MPIA and the limited exemption provided by Agric. § 8-801.1(b)(2). Appellees provide no support for the assumption that the Legislature's concern for confidentiality supersedes the transparency goals of the MPIA as to records other than NMP summaries maintained for three years or less. Thus, this Court should

¹ If the General Assembly were to conclude that an unintended loophole indeed exists, it is free to pursue a legislative fix. *See Comptroller of the Treasury of Md. v. American Can Co.*, 208 Md. 203, 209, 117 A.2d 559, 561 (1955) (“[T]he function of closing loopholes belongs to the Legislature and not the courts.”). However, this Court must “give effect to the statute as it is written.” *Bowen v. City of Annapolis*, 402 Md. 587, 614, 937 A.2d 242, 258 (2007); *see also, Maxwell v. State ex. rel. Baldwin*, 40 Md. 273, 294 (1874) (“If [the Legislature has] failed to express their real intentions, it is for them and not the Courts to amend the law, and make it express the legislative will.”). Therefore, the mere possibility of legally circumventing a narrowly-tailored statute should not play a role in this Court's analysis.

find that MDA has failed to meet its burden in sustaining its denial of full public access to those documents based on Agric. § 8-801.1(b)(2).

Farm Bureau attempts to improperly shift the burden from MDA to Appellants, by seeking to distinguish the line of cases establishing the requirement to construe MPIA exemptions narrowly. Farm Bureau Br. at 17-18. However, the varying facts from the cases cited do nothing to support a broad reading of the exemption at issue; to the contrary, the diversity of cases cited addressing varying exemptions underscores the requirement to construe *all* MPIA exemptions narrowly. Farm Bureau correctly states that redactions can provide an appropriate way to give effect to an exemption. Farm Bureau Br. at 17. However, in the cases cited, the records redacted prior to disclosure were records expressly covered by the exemption, not, as the Appellees urge here, a broad universe of records not even contemplated by Agric. § 8-801.1(b)(2). *See Md. Dep't of State Police v. Md. State Conference of NAACP Branches*, 430 Md. 179, 59 A.3d 1037 (2013); *Office of Governor v. Washington Post Co.*, 360 Md. 520, 759 A.2d 249 (2000); *Kirwan*, 352 Md. 74, 721 A.2d 196. Appellants agree that redactions are appropriate in this case, but should be limited to identifying information (names, addresses, signatures, and unique identifying numbers) in NMP summaries maintained for three years or less.

Farm Bureau attempts to further confuse the clear mandate of the MPIA by alleging that Appellants' reading would violate a general privacy exemption. Farm Bureau Br. at 16. In so doing, it relies on State Gov't § 10-612(b) and a quotation taken

out of context from a Maryland Attorney General's Opinion regarding information revealed in 911 calls. *Id.* However, there is no "invasion of privacy" exemption to the MPIA. *Kirwan*, 352 Md. at 88–89, 721 A.2d at 203. To the contrary, State Gov't § 10-612(b) "is part of an internal statutory construction provision having no independent effect." *See Police Patrol Sec. Sys. v. Prince George's Cnty.*, 378 Md. 702, 717, 838 A.2d 1191, 1200 (2003). While State Gov't § 10-612(b) may allow exemptions to the MPIA to be construed more broadly if a privacy issue is at stake, there must still be "some basis in law for the denial of a request before choosing to withhold public records." *Id.* No such basis exists here, as the plain language of Agric. § 8-801.1(b)(2) clearly limits the exemption to identifying information contained in NMP summaries. Regardless, MDA continues to bear the burden of upholding its denial of access to public records. *Fioretti*, 351 Md. at 78, 716 A.2d at 264. Here, MDA has relied on Agric. § 8-801.1(b)(2) alone to support its broad construction of the exemption, rather than asserting that State Gov't § 10-612(b) supports an expansive interpretation based on some undefined "privacy right." Considering that MDA has not based its denial on that provision, and that no basis in law exists for denying access to anything other than identifying information on NMP summaries, Farm Bureau's reliance on State Gov't § 10-612(b) is misplaced.

II. THE EXEMPTION FROM DISCLOSURE PROVIDED BY AGRIC. § 8-801.1(b)(2) ONLY APPLIES TO IDENTIFYING INFORMATION IN NUTRIENT MANAGEMENT PLAN SUMMARIES SUBMITTED TO MDA PURSUANT TO THAT RECORDKEEPING PROVISION

Appellees MDA and Farm Bureau are asking this Court to disregard the plain language and common sense reading of Agric. § 8-801.1(b)(2) based on unsupported assertions regarding legislative intent and misplaced reliance on agency deference. The lower courts' and Appellees' interpretations run afoul of well-established principles of statutory construction and improperly expand the plain language of Agric. § 8-801.1(b)(2).

A. The Plain Language of Agric. § 8-801.1(b)(2) Unambiguously Limits its Exemption from Disclosure to Identifying Information in Nutrient Management Plan Summaries

This Court has repeatedly affirmed that “[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature,” *Bowen*, 402 Md. at 613, 937 A.2d at 257 (*quoting Kushell v. Dep’t of Natural Res.*, 385 Md. 563, 576, 870 A.2d 186, 193 (2005)), and has established principles of statutory construction designed to discern legislative intent. If the statutory language “is unambiguous when construed according to its ordinary and every day meaning, [courts] give effect to the statute as it is written.” *Id.* (*quoting Kushell*, 385 Md. at 577, 870 A.2d at 193) (internal quotations omitted). The plain language of Agric. § 8-801.1(b)(2), which requires MDA to “maintain a copy of each [NMP] summary for 3 years in a manner that protects the

identity of the individual for whom the nutrient management plan was prepared,” unambiguously limits the scope of documents subject to that recordkeeping provision, and therefore subject to redaction of identifying information under the MPIA, to NMP summaries.

Appellees urge this Court to look beyond the unambiguous language of the statute, alleging that this reading would undermine legislative intent. However, when viewed alone as well as in the context of the WQIA as a whole, as urged by the Appellees, *see Farm Bureau Br. at 8, 11, citing Lonaconing Trap Club, Inc. v. Maryland Dep’t of the Env’t*, 410 Md. 326, 978 A.2d 702 (2009), this unambiguous language results in a common sense, logical, and reasonable balance between the exemption provided by Agric. § 8-801.1(b)(2) and access to public records. *See Farm Bureau Br. at 8, citing Smith v. State*, 425 Md. 292, 299, 40 A.3d 428, 432 (2012).

Without providing support for its argument, Farm Bureau implies that the meaning of Agric. §8-801.1(b)(2) becomes ambiguous when viewed in the context of the WQIA as a whole, making it necessary to look beyond the statutory text. *See Farm Bureau Br. at 11, quoting Lockshin v. Semsker*, 412 Md. 257, 276, 987 A.2d 18, 29 (2010). However, the statutory context actually underscores the logic of the plain language meaning. Similarly, MDA asserts without support that the WQIA’s “paramount goal” is farm confidentiality, MDA Br. at 25, though the exemption contained in Agric. §8-801.1(b)(2), a recordkeeping provision of the WQIA, is plainly incidental to the primary water quality drivers of the statute.

The General Assembly passed the WQIA in 1998 to address nutrient pollution threatening the state's waterways, and to require farms to implement NMPs to reduce their contribution to water quality problems. *See, e.g.*, S.B. 178 Fiscal Note (Revised – Corrected June 25, 1998); H.B. 599 Fiscal Note (Revised – Corrected June 25, 1998) E.83, 93; *Waterkeeper Alliance*, 211 Md. App. at 427-48, 438, 65 A.3d at 714, 720. Far from ascribing an “absurd” meaning to a plain language interpretation, MDA Br. at 25, *citing Bernstein v. State*, 422 Md. 36, 45, 29 A.3d 267, 272 (2011), this larger statutory context confirms the reasonableness of the plain language reading of Agric. 8-801.1(b)(2), which best gives effect to the water quality objectives of the WQIA, the confidentiality objective of Agric. § 8-801.1(b)(2), and the transparency objective of the MPIA. Confirmation that the plain language of the statute, when viewed in isolation as well as in the context of the statutory scheme, results in a reasonable, common sense outcome should end this Court's inquiry into legislative intent. *See Lockshin*, 412 Md. at 274-75, 987 A.2d at 28-29.

A closer look at Appellants' interpretation, which is not as narrow as Appellees imply, affirms that a plain language construction will lead to a reasonable outcome. MDA has noted that it may still receive entire NMPs for certain operations, and that farms must submit Annual Implementation Reports (“AIRs”) for their NMPs. MDA Br. at 12, 14. Appellants have consistently agreed with MDA that these documents, when submitted to MDA pursuant to the same recordkeeping provision as NMP summaries and maintained for three years or less, are within the scope of Agric. § 8-801.1(b)(2)'s

exemption from disclosure for identifying information. *See, e.g.*, Appellants' Br. at 6, n.5. Accordingly, Appellants seek an order from this Court clarifying that MDA may only redact actual identifying information – names, addresses, signatures, and unique identifying numbers – from NMP summaries, NMPs, and AIRs submitted pursuant to Agric. § 8-801.1(b)(2) and maintained by MDA for three years or less.

B. The Court of Special Appeals Misconstrued the Legislative Intent Behind
Agric. § 8-801.1(b)(2) with a Strained Analysis of Legislative History

Despite the unambiguous and reasonable plain language of Agric. § 8-801.1(b)(2), the Court of Special Appeals erred by continuing its inquiry into other indicia of legislative intent in an effort to contradict, rather than confirm, the plain statutory language. Even if it were proper for the Court of Special Appeals to look beyond the plain and unambiguous language of the statute, it erred in applying the principles of construction for such an analysis. Because “the Legislature is presumed to have meant what it said and said what it meant,” *Bowen*, 402 Md. at 614, 937 A.2d at 258, a court construing a statute “may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle interpretations that limit or extend its application.” *Id.* at 613, 257–58 (*quoting Kushell*, 385 Md. at 576–77). However, the Court of Special Appeals did exactly that when it improperly relied on scant and immaterial legislative history to contradict the plain language and extend the application of Agric. § 8-801.1(b)(2) to encompass all documents related to NMPs and NMP summaries.

“[T]he resort to legislative history is a confirmatory process; it is not undertaken to contradict the plain meaning of the statute.” *Whitley III., et al. v. Md. State Bd. Of Elections, et al.*, 429 Md. 132, 155-56, 55 A.3d 37, 51 (2012) (*quoting Mayor & City Council of Balt. v. Chase*, 360 Md. 121, 131, 756 A.2d 987, 993 (2000)). In the case at hand, however, the slim legislative history sheds no light on the legislative intent behind Agric. § 8-801.1(b)(2), and even the Farm Bureau’s and MDA’s “forced and subtle interpretations” fail to provide support for “extend[ing] [the] application” of the exemption provided by Agric. § 8-801.1(b)(2) beyond NMP summaries. *Bowen*, 402 Md. at 613, 937 A.2d at 257–58 (*quoting Kushell*, 385 Md. at 576–77).

Both parties make hay of the Legislature’s failure to amend any language related to confidentiality when it amended the WQIA to require the submission of NMP summaries, rather than entire NMPs, in 2004. *See* MDA Br. at 22-24, Farm Bureau Br. at 9-10. Appellants do not dispute this point. But Farm Bureau infers the incorrect meaning from the Legislature’s maintenance of the status quo regarding confidentiality, asserting there was “no indication that the legislature intended to *remove* the confidentiality protection from *all NMP-related documents* other than summaries.” Farm Bureau Br. at 10 (emphasis added). This supposed confidentiality protection for “all NMP-related documents” never existed in the statute, and therefore the Legislature did nothing to change this in 2004. Agric. § 8-801.1(b)(2) initially applied to only to NMPs submitted pursuant to that provision, and following the 2004 amendment, Agric. § 8-801.1(b)(2) applied to NMP summaries submitted pursuant to that provision. At no point

in its history has Agric. § 8-801.1(b)(2) applied to – or even mentioned – any other documents related to NMPs. The failure to amend the confidentiality language in 2004, therefore, indicates nothing more than that the Legislature wanted to maintain the limited MPIA exemption for identifying information in those specific documents submitted pursuant to the WQIA’s recordkeeping provision, Agric. § 8-801.1(b)(1), while limiting the volume of the actual records.

Nonetheless, Appellees insist that the Legislature could not possibly have meant what it said in Agric. § 8-801.1(b)(2) because MDA possesses other documents, such as on-farm audits and inspection reports, that it created or obtained through other means than that recordkeeping provision. MDA Br. at 13. Releasing these documents as public records not subject to any exemption from the MPIA, the parties assert, could render the confidentiality provision meaningless by creating a potential trail of bread crumbs from document to document, which “could lead” a record requestor to connect the subject of a public document to the holder of a current NMP summary, despite the fact that the current NMP summary would have identifying information redacted prior to disclosure under the MPIA. Farm Bureau Br. at 10, E.185.

The lower courts’ decisions do not, as Farm Bureau states, allow only for redactions of “identifying information” from NMP documents. Farm Bureau Br. at 17. Rather, MDA must implement broad redactions of general information on an enforcement spreadsheet and make subjective determinations as to whether any piece of information in any NMP-related document the agency possesses could be used to link a

farmer to an NMP summary. E.368-70. MDA must currently redact such information as total farmed acres and even farm *type* from otherwise public records, under the rationale that disclosing such information would narrow the universe of farms that could be linked to a given NMP. *Id.* It is simply not reasonable to assume that knowing whether a farm grows corn or raises chickens will lead to identification of the operator in a state where more than 5,000 farms submit NMP summaries.

Redacting broad categories of information from documents other than NMP summaries under this tenuous rationale is in no way contemplated by the plain language of the statute and contravenes this Court's policy of construing exemptions to the MPIA narrowly. Moreover, it is unreasonable to presume that the Legislature, in drafting language clearly limited to NMP summaries, actually intended to establish the Circuit Court's subjective test for MDA to discern which documents and information it must redact.

C. MDA's *Ultra Vires* Regulation is Contrary to the Plain Language of Agric. § 8-801.1(b)(2), and Therefore Warrants no Deference from this Court

MDA has asserted that its regulation, Code of Md. Regs. 15.20.07.06A(4) (2012), which attempts to implement Agric. § 8-801.1(b)(2) by requiring MDA to "protect the confidentiality of *all nutrient management plan information submitted*, so as to protect the identity of the person for whom the plan was developed" (emphasis added), is entitled to deference from this Court. MDA Br. at 21. To support this assertion, MDA relies on the general principle that an administrative agency's position warrants some weight in

interpreting a statute it administers and also claims that the reasonableness of its interpretation weighs in favor of deference. *Id.* However, this Court has established that if the statutory language is unambiguous and legislative history does not point to a contrary legislative intent, courts will not give any weight to the agency's interpretation. *Marriott Emps. Fed. Credit Union v. Motor Vehicles Admin.*, 346 Md. 437, 446, 697 A.2d 455, 459 (1997). *See also Dep't of Human Res., Balt. City Dep't of Soc. Services v. Hayward*, 426 Md. 628, 669, 45 A.3d 224, 242 (2012). In light of the unambiguous language in Agric. § 8-801.1(b)(2) and the absence of any relevant legislative history, this Court should not give MDA's *ultra vires* interpretation of Agric. § 8-801.1(b)(2) any weight.

An agency is not a lawmaking body and must follow "the letter and policy of the statute under which the administrative agency acts." *Md. State Police v. Warwick Supply & Equip. Co.*, 330 Md. 474, 481, 624 A.2d 1238, 1241 (1993). Thus agency regulations must fall within the scope of authority that the Legislature granted the agency through the governing statute. *Id.* An agency regulation that is "inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts, impairs, limits, or restricts the act being administered" is impermissible. *Id.* The expansive language of Code of Md. Regs. 15.20.07.06A(4), which protects all NMP information submitted to MDA, improperly "extends or enlarges" the narrowly-tailored protection afforded by the WQIA's recordkeeping provision to the entire universe of information related to NMPs in MDA's possession.

MDA also argues that consistent interpretation and application of its own regulation warrants deference, MDA Br. at 21, but any reliance on a regulation that contravenes the statute is misplaced, regardless of how long the rule has been in place. *Falik v. Prince George's Hosp. and Medical Center*, 322 Md. 409, 416, 588 A.2d 324, 327 (1991). The consistency of MDA's application of its regulation also has no bearing on the weight this Court should give it. "[W]hen statutory language is clear and unambiguous, administrative constructions, no matter how well-entrenched, are not given weight" by the Court. *Bowen*, 402 Md. at 613, 937 A.2d at 257, citing *John A. v. Bd. of Education*, 400 Md. 363, 382, 929 A.2d 136, 147 (2007). See also, e.g., *St. Dept. of A. & T. v. Greyhound Comp.*, 271 Md. 575, 589, 320 A.2d 40, 47 (1974) ("the unvarying construction of a law by the agency charged with its enforcement over a long period of time ... cannot override the plain meaning of the statute or extend its provisions beyond the clear import of the language employed.").² Thus, Farm Bureau's attempt to distinguish *Haigley v. Dep't of Health & Mental Hygiene*, 128 Md. App. 194, 736 A.2d 1185 (1999) because the agency in that case relied on an informal interpretation of a statute it administers, rather than a regulation, Farm Bureau Br. at 18, is of no

² In addition to its general deference arguments, MDA implies that this Court should infer a specific meaning and legislative intent behind the General Assembly's failure to react adversely to MDA's regulation when it amended Agric. § 8-801.1(b)(2) in 2004 to require the submission of NMP summaries, rather than NMPs, suggesting that this failure to act indicates legislative agreement with or acquiescence to MDA's regulation. MDA Br. at 24. However, this argument is unpersuasive, since even the failure to pass specific introduced legislation "is a rather weak reed upon which to lean in ascertaining legislative intent." *Automobile Trade Ass'n v. Ins. Comm'n*, 292 Md. 15, 24, 437 A.2d 199, 203 (1981).

consequence. In sum, MDA's regulation impermissibly extends the exemption in Agric. § 8-801.1(b)(2) and therefore should be given no deference from this Court.

III. THE COURT OF SPECIAL APPEALS ERRED BY BROADENING THE EXEMPTION FROM DISCLOSURE PROVIDED BY AGRIC. § 8-801.1(b)(2) BEYOND THE STATUTE'S THREE-YEAR LIMIT

The plain language and legislative history of Agric. § 8-801.1(b)(2) unambiguously limit the disclosure exemption to documents maintained by MDA for three years or less. As MDA points out, despite its incongruous July 14, 2011 Order widening the scope of the statutory exemption, the Circuit Court determined that the language in Agric. § 8-801.1(b)(2) is "clear and unambiguous" and its "privacy interest only lasts for three years." MDA Br. at 4-5; E.368-70. The Court of Special Appeals did not dispute this finding as to the unambiguous nature of the statutory language and time-limited nature of the exemption, *Waterkeeper Alliance*, 211 Md. App. at 440-41, 65 A.3d at 722, but deviated dramatically from rules of statutory interpretation to affirm the Circuit Court's unsupported Order.

Although a court construing a statute "may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute," *Bowen*, 402 Md. at 613, 937 A.2d at 257-58 (*quoting Kushell*, 385 Md. at 576, 870 A.2d at 193), the Court of Special Appeals' strained analysis rendered Agric. § 8-801.1(b)(2)'s three-year time limit meaningless. After acknowledging that the provision is

unambiguous and that no legislative history sheds light on its meaning,³ *Waterkeeper Alliance*, 211 Md. App. at 441, 65 A.3d at 722, the court attempted to “harmonize” the three-year exemption with another Maryland agricultural law. As MDA explains, however, the Court of Special Appeals misapplied this analysis. MDA Br. at 27-32. The Court of Special Appeals improperly attempted to harmonize Agric. § 8-801.1(b)(2) with a law addressing a different subject, stretched to reconcile a supposed contradiction between the two laws that actually co-exist without conflict, and ultimately gave effect to the more general, and unrelated, provision, rendering the “three years” language in the more specific Agric. § 8-801.1(b)(2) meaningless surplusage.

In addition, looking beyond the unambiguous language of Agric. § 8-801.1(b)(2) is inappropriate in this case because applying the clear three-year limit on the recordkeeping provision’s limited exemption from disclosure does not lead to unreasonable results or defy common sense. *Smith*, 425 Md. at 299, 40 A.3d at 432. To the contrary, it is intuitive and reasonable for the Legislature to carve out an exemption from disclosure of identifying information for the entire three-year lifetime of an NMP,

³ Farm Bureau attempts to reveal a legislative intent to provide perpetual confidentiality by parsing the WQIA’s 1998 Fiscal Notes and pointing to language stating MDA must keep approved plans for three years (Farm Bureau Br. at 13; E.85, 95). However, the Note’s failure to even mention confidentiality when summarizing the WQIA’s pertinent provisions hardly supports Farm Bureau’s claim. Farm Bureau then highlights a comma in an earlier Fiscal Note version (“...and MDA must keep a copy for three years, protecting the identity of the plan holder.”). E.105. If anything, this language harms Farm Bureau’s contention because “[i]n ordinary usage, modifiers refer to the nearest plausible antecedent,” *Kushell*, 385 Md. at 578, 870 A.2d at 194; in this case the requirement to protect the identity of the plan holder modifies the three years clause, reflecting the time-limited nature of the protection.

but would be illogical to grant a permanent exemption for information in documents that themselves are of a time-limited nature. The requirement to amend and update NMPs with new soil analysis results every three years — resulting in new calculations for nutrient application rates on every tested field — means that the details of NMPs and NMP summaries will change whenever updated. This requirement calls into question Farm Bureau’s unsupported assertion that NMPs change so little over time that providing complete public review of plans more than three years old will make current plan holders readily identifiable, and thereby render the exemption provision “meaningless.”⁴ Farm Bureau Br. at 12.

The Court of Special Appeals’ attempt to write the three years requirement out of Agric. § 8-801.1(b)(2) proceeded to include examinations of nutrient management cases from other states, as well as various federal Freedom of Information Act (“FOIA”) cases. *Waterkeeper Alliance*, 211 Md. App. at 446-51, 65 A.3d at 725-28. Farm Bureau defends this analysis, asserting that “there is nothing wrong with looking outside of Maryland” to gain a better “understanding for how other states treat the issue of confidentiality in NMP-related documents.” Farm Bureau Br. at 15, n.1. However, an understanding of how a handful of other states address confidentiality of those states’ versions of nutrient

⁴ Although NMP soil analyses must be updated every three years, requiring operators to submit new or revised NMPs to MDA on this general timeline, this does not dictate how long MDA maintains NMP documents. MDA retains documents for more than three years for its own administrative purposes and the agency is subject to other requirements for archiving documents it receives. *See* E.127 n.2, E.184. Consequently, a reading of Agric. § 8-801.1(b)(2) that divorces the three year language from the confidentiality language would render the three year language without meaning.

management documents under those states' agricultural laws does nothing to shed light on how Maryland's Legislature has chosen to treat NMPs under the WQIA.⁵

In both cases Farm Bureau relies on for support of the lower court's sweeping review of extra-jurisdictional case law, *Mummert v. Alizadeh*, 435 Md. 207, 77 A.3d 1049 (2013), and *Mundey v. Erie Ins. Group*, 396 Md. 656, 914 A.2d 1167 (2007), this Court looked to outside jurisdictions with language *similar* to the Maryland statutory provision at issue. These cases are inapplicable here because, as discussed in Appellants' brief, the cases discussed by the Court of Special Appeals do not involve statutes with language similar to Agric. § 8-801.1(b)(2). Appellants' Br. At 12-13. Those cases merely involve nutrient management planning, which varies widely by state, and shed no light on the meaning of the statute at issue in this case. *See Mummert*, 435 Md. at 223-24, 77 A.3d at 1058 ("cases...where a particular jurisdiction employs a [statute] with significantly different language than our statute, are not particularly helpful to our analysis in this case.").

CONCLUSION

For the foregoing reasons, this Court should find that the Court of Special Appeals erred in expanding the narrow exemption from disclosure provided by Agric. § 8-801.1(b)(2) beyond the unambiguous language of the statute to include documents other

⁵ With regard to FOIA, while this Court has appropriately looked to federal case law to interpret similar provisions in the MPIA, *see, e.g., Fioretti*, 351 Md. at 75-76, 716 A.2d at 263, the Court of Special Appeals instead relied on dissimilar FOIA cases dealing with unrelated exemptions from unrelated federal agricultural laws.

than NMP summaries maintained by MDA for three years or less. This Court should adhere to the plain language of the Statute and the objectives of the MPIA, decline to grant MDA's overly broad interpretation any deference, and hold that Agric. § 8-801.1(b)(2) protects only identifying information – names, addresses, signatures, and unique identifying numbers – in NMP summaries, NMPs, and AIRs, submitted to MDA pursuant to that provision and maintained for three years or less, from disclosure under the MPIA.

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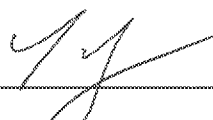
CERTIFICATE OF SERVICE

I hereby certify this 7th day of April 2014 that two copies of the foregoing Reply Brief of Appellants Waterkeeper Alliance, Inc., et al. were mailed first class, postage prepaid to:

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